No. 127067

In the Supreme Court of Illinois

DONOVAN MUNOZ, Plaintiff-Petitioner, v. BULLEY & ANDREWS, LLC, Respondent.	) On Appeal for the Appellate Court) of Illinois, First Judicial District) No. 1-20-0245)) There Heard from the Circuit Court) of Cook County, Illinois,) County Department) Law Division, No.: 19 L 3878)) The Honorable Daniel T. Gillespie,) Judge Presiding)

BRIEF *AMICUS CURIAE* OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT PLAINTIFF-PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Illinois Trial Lawyers Association ("ITLA") is a statewide organization whose members focus their practices in representing injured consumers and workers. Founded in 1952, the organization has more than 2,000 members. ITLA's principles and mission are simple: to achieve and maintain high standards of professional ethics, competency and demeanor in the bench and bar; to uphold the Constitutions of the United States of America and the State of Illinois; to secure and protect the rights of those injured in their persons or civil rights; to defend trial by jury and the adversarial system of justice; to promote fair, prompt and efficient administration of justice; and to educate and train in the art of advocacy.

The Illinois Trial Lawyers Association offers its experience and perspective as amicus curiae to assist this Court in the resolution of the important issues raised by this appeal. The Illinois Trial Lawyers Association, as amicus curiae, urges this Court to reverse the Appellate Court's decision that a third party general contractor that pays workers' compensation benefits to a subcontractor's employee because of a contractual obligation is absolutely immune from liability for its own negligence or wrongful conduct.

ARGUMENT

In direct contradiction to the plain text of the Illinois Workers' Compensation Act (the "Act"), the *Munoz* court in this case penned an additional definition of "employer" and limitation on an injured worker's common law and statutory rights of recovery against third party general contractors. In particular, the appellate court held that a general contractor's pre-existing legal obligation to pay for the injured employee's workers' compensation insurance brings the general contractor within the exclusive

remedy provisions of the Workers Compensation Act and therefore immunizes the general contractor from a lawsuit for damages due to its own negligence. *See Munoz v. Bulley & Andrews, LLC*, 2021 IL App (1st) 200254, ¶ 23. In other words, the third party general contractor is now treated as an "employer" and afforded the same protection as the employer, and the injured plaintiff loses his right to make a claim for compensation due to the general contractor's negligence.

But contrary to *Munoz*, the plain text of the Workers' Compensation Act does not include in its definition of "employer" a general contractor that undertakes a contractual obligation to purchase workers compensation insurance. Further, the Act does not place any limits on an injured employee's common law recovery against general contractors. *See* 820 ILCS 305/5(a) & (b). In fact, Illinois' legislature clearly expressed its intent to permit injured employees to pursue their common law and statutory rights of recovery against third-parties. *See id.* Further, this Court previously rejected the contention that a general contractor's pre-existing legal obligation to pay another employer's injured employee's workers' compensation insurance bars an injured employee's common law or statutory rights of recovery against said general contractor. *See Laffoon v. Bell & Zoller Coal Co.*, 65 Ill.2d 437 (1976). The *Laffoon* Court based this holding on the constitutional guarantees of Due Process and Equal Protection. *Id*. at 443-47. Moreover, allowing a third-party—in particular, a general contractor—to easily skirt liability for its own negligence by paying for another employer's workers' compensation insurance is severely at odds with the long-standing public policy in Illinois and contrary to the law of other jurisdictions throughout the United States. As such, the appellate court's *Munoz*

opinion—if not corrected—strikes a fatal blow to worker protections and job site safety in Illinois.

I. The *Munoz* Court Wrote an Impermissible Expansion into the Workers' Compensation Act Expanding the Definition of "Employer"—Contrary to the Plain Text of the Act, Contrary to this Court's Opinion in *Laffoon*, and Contrary to Cases Throughout the United States.

While the Illinois Workers' Compensation Act bars an employee from bringing a civil suit directly against his or her employer, it does not limit the employee's recovery from a third party general contractor. *See* 820 ILCS 305/5(a) & (b). Indeed, the "injured employee may also have a cause of action against a third party to the employment relationship, such as a general contractor, whose negligence allegedly caused or contributed to the employee's injuries." *Virginia Surety Co. v. Northern Insurance Co.*, 224 Ill. 2d 550, 557 (2007). Consider the plain and explicit text of Section 5(b) of the Act:

> *Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act*. In such case, however, *if the action against such other person is brought by the injured employee or his personal representative* and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, *then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative* including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.

820 ILCS 305/5(b) (emphasis added). As such, the Act accords with the principle that the ultimate loss from wrongdoing should fall upon the wrongdoer as long as it is not the "employer." *In re Estate of Dierkes*, 191 Ill.2d 326, 332 (2000).

In direct contradiction to the plain text of the Act, the *Munoz* Court held that a third-party general contractor, who is not the employer of an injured worker, somehow becomes the "employer" and is entitled to the Act's exclusive remedy if the general contractor provides workers' compensation benefits and/or insurance for another contractor's injured employee. *Munoz v. Bulley & Andrews*, LLC, 2021 IL App (1st) 200254, ¶ 22. However, the Act clearly defines what constitutes an "employer" and therefore who should receive immunity. The Act contains no language that the one who "bears the burden of furnishing workers' compensation benefits for an injured employee" or has "a preexisting legal obligation to pay for workers' compensation insurance and any benefits" is an employer and therefore entitled to the Act's exclusive remedy provision.

Inapposite to Illinois, some state legislatures have included such language to immunize the general contractor in their workers' compensation acts. In doing so, these legislatures have specifically chosen to include language expanding the definition of "employer" and extending their workers compensation act's immunity beyond immediate employers to general contractors who pay for the workers' compensation insurance of their subcontractors and their subcontractor' employees—see, *e.g.*, Arizona,[1]

[1] *See generally Word v. Motorola, Inc.*, 135 Ariz. 517, 518, 662 P.2d 1024, 1025 (1983) (recognizing that legislature provided a "statutory employer" defense in the Arizona Workers' Compensation Act for general contractors).

Connecticut,[2] Utah,[3] and Texas[4]. In these states, courts have held that because of the inclusion of such language into their respective statutory schemes, the third party general contractor is immune from liability where it purchases such insurance pursuant to the express terms of the Act.

However, other state legislatures, including Illinois, have not included such language expanding their workers compensation act's immunity to include third party general contractors who purchase workers' compensation coverage for their subcontractors. And because the legislatures in those States did not include language expanding the immunity of the Acts, the courts from those States have refused to immunize the third party general contractor from its own negligence due to its purchase of workers' compensation insurance or the self-serving creation of a contractual obligation to purchase workers' compensation insurance. *S*ee, ***e.g., Kilgore v. C. G. Canter, Jr. & Associates, Inc.***, 396 So. 2d 60, 63 (Ala. 1981); ***Deen v. Quantum***

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[2] Connecticut's legislature chose to specifically extend immunity under its workers' compensation act to "principal employers,"—*i.e*., an employer that hires a contractor or subcontractor—so long as the principal employer paid for the compensation benefits in accordance with its act. Conn. Gen. Stat. § 31-291. *See generally Gonzalez v. O & G Industries*, 322 Conn. 291, 303-04, 140 A.3d 950, 958 (2016); *Pelletier v. Sordoni/Skanska Construction Co.*, 264 Conn. 509, 518-19, 825 A.2d 72 (2003).

[3] Utah's legislature took an approach similar to Connecticut, and chose to extend its act's exclusive remedy provision to include general contractors who qualify as "eligible employers"—*i.e*., a contractor that hires subcontractors—so long as the contractor satisfies certain conditions, including securing the payment of workers' compensation benefits for the subcontractor. *See Nichols v. Jacobsen Construction Co.*, 2016 UT 19, ¶ 14, 374 P.3d 3, 811 Utah Adv. Rep. 47 (citing Utah Code Ann. § 34A-2-103(7)(f)(i) & (iii)(B)).

[4] Likewise, Texas's legislature permits a general contractor to become a "statutory employer" and entitle itself to the benefits conferred on employers under its workers' compensation act by entering into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 354, 52 Tex. Sup. Ct. J. 555 (2009) (citing Tex. Lab. Code § 406.123(e)).

Resources, 750 So.2d 616, 617-622, 24 Fla. L. Weekly 489 (1999); *Wolf v. Kajima International*, 629 N.E.2d 1237 (Ind. 1994), *granting transfer and adopting reasoning from* 621 N.E.2d 1128, 1130 (Ind. Ct. App. 1993). These state courts found no basis to write in such an expansion of the definition of "employer" or the immunity provisions when interpreting the Acts.

For example, consider the Indiana's Supreme Court decision in *Wolf v. Kajima International*, 629 N.E.2d 1237 (Ind. 1994). There, the Indiana Supreme Court adopted and incorporated by reference the holding of its Court of Appeals that an owner or general contractor does not alter its status concerning potential tort liability to employees of subcontractors by directly purchasing workers' compensation insurance on behalf of its subcontractors. *Id.*

In *Wolf*, the general contractor argued that the plaintiff was barred from pursuing a separate tort action against it because it was a statutory employer under Indiana's Workers' Compensation Act and the plaintiff had collected worker's compensation benefits under the general contractor's "wrap-up" or "wrap-around" insurance policy. *Wolf v. Kajima International*, 621 N.E.2d 1128, 1130 (Ind. Ct. App. 1993). In rejecting the general contractor's argument, the *Wolf* Court explained that Indiana's act imposes a duty on the immediate employer to secure workers' compensation insurance. *Id.* at 1132. In instances where the general contractor fails to ensure its subcontractors secure the insurance, the act makes the general contractor secondarily liable for the payment of compensation on account of a subcontractor's employee suffering an on-the-job injury or death. *Id.* The *Wolf* Court reasoned that this secondary liability imposed by the act

evidenced an intent by Indiana's legislature to encourage general contractors to insist that subcontractors obtain the insurance required by law. *Id.*

In rejecting the general contractor's argument, the *Wolf* Court found that the secondary liability imposed by the act could not be read as an intention by the Indiana legislature to allow a general contractor to voluntarily take out insurance that the law did not require and thereby remove itself from liability for its own negligence. *Id. T*he *Wolf* Court discussed the long-standing rule in Indiana that the act should be liberally construed to effectuate its humane purpose, and that doubts in the application of the terms should be resolved in favor of the employee. *Id.* The *Wolf* Court found that the exclusive remedy provision of the act did not apply to prohibit an employee from asserting third-party claims against persons other than his employer, and that a general contractor could not alter its status concerning potential tort liability to employees of contractors or subcontractors by simply purchasing workers' compensation insurance on behalf of its subcontractors. *Id.*

The Florida Supreme Court rejected the immunity argument where the general contractor was contractually obligated to purchase workers compensation insurance for subcontractors in *Deen v. Quantum Resources*, 750 So.2d 616, 617-622 (Fla. 1999). The issue in *Deen* was whether a self-insured public utility that **contractually assumed responsibility** to provide workers' compensation coverage for its subcontractor's employees was immune from a third-party suit brought by one of the subcontractor's employees. *Id.* The *Deen* Court rejected the public utility's argument that it stood "in the shoes" of the subcontractor-employer and thus assumed the subcontractor-employer's immunity by contractually assuming the obligation of providing workers' compensation

benefits to the subcontractor's employees. *Id.* In rejecting the public utility's argument, the *Deen* Court recognized that the common law right of recovery from third parties in tort should not be abridged unless specifically stated in the workmen's compensation statutes, and that under a plain reading of the Florida workers' compensation statute the public utility was not immunized under the exclusivity provisions. *Id.*

Likewise, the Alabama Supreme Court reached the same result in *Kilgore v. C. G. Canter, Jr. & Associates, Inc.*, 396 So. 2d 60 (Ala. 1981). The issue in *Kilgore* was whether the plaintiff was barred from suing a general contractor for negligence and failing to maintain a safe place to work when the plaintiff had received workmen's compensation benefits from the general contractor's workmen's compensation insurance carrier made on behalf of the subcontractor. *Id.* at 61. The *Kilgore* Court held that the Alabama Workmen's Compensation Act made it clear that the exclusive remedy is only available in situations where an employee is suing his employer for injury in the course of his employment. *Id.* at 63. Thus, to come within the terms of the act and have liability limited to the benefits paid thereunder, it was essential that the person seeking to limit the remedy of the injured party be in an employer-employee relationship with that plaintiff. *Id.* Because it was clear that the plaintiff was not an employee of the general contractor, the *Kilgore* Court reversed the trial court's grant of summary judgment. *Id.*

As in the above cases, the Illinois legislature in writing the Illinois Workers' Compensation Act only provided immunity for the plaintiff's employer and certain other limited entities. *See* 820 ILCS 305/5(a). The Illinois legislature did not expand the immunity to include third party general contractors who are contractually obligated to purchase workers compensation insurance or who otherwise purchase workers

compensation insurance. *See* 820 ILCS 305/5(a) & (b). This Court should not write that into the statute in derogation of common law and the rights of working men and women in Illinois. Just like the acts in Indiana, Florida, and Alabama, the Illinois Workers' Compensation Act only limits an injured employee's common law and statutory rights of recovery against his immediate employer, or its insurers, brokers, service organizations, and agents. *See Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 447 (1976) (As this Court stated, "we must interpret section 5(a) as conferring immunity upon employers only from common law or statutory actions for damages by their immediate employees").

Further, this Honorable Court has already held that where there is a pre-existing responsibility of the general contractor pursuant to the workers compensation act to buy workers compensation insurance for uninsured employer/subcontractor, then the general contractor does not become the employer and is not granted immunity. *See Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 440-48 (1976). Here, whether the obligation to buy workers compensation insurance is statutory or contractual makes no difference. *Laffoon* makes clear that immunity should not be expanded without a statutory basis. The Court should not expand the definition of employer and provide immunity to an entire class of third parties whose negligence may result in injury during construction. The Illinois Workers' Compensation Act cannot be read as an intention by Illinois' legislature to grant such immunity for general contractors who voluntarily write contracts requiring them to buy workers' compensation insurance for their subcontractors.

Laffoon reached the same conclusion that Indiana's court reached when interpreting a similar section in their act. And like Indiana's act, the Illinois Workers' Compensation Act should be construed to effectuate its humane purpose, and any doubts

in the application of its terms should be resolved in favor of the employee. *See General American Life Insurance Co. v. Industrial Com.*, 97 Ill. 2d 359, 370 (1983) (recognizing the Act "is a humane law of remedial nature whose fundamental purpose is to provide employees and their dependents, sure and define compensation").

Consequently, this Court should require Illinois courts to follow the plain and unambiguous text of the exclusive remedy provision of Illinois' Workers' Compensation Act. The Act clearly permits an employee to assert third-party claims against persons other than his employer; the Act does not prohibit such third-party actions. And a general contractor cannot alter its status or its potential tort liability to injured employees of other contractors or subcontractors by directly purchasing workers' compensation insurance on behalf of these other contractors or subcontractors. Other state courts are not writing such provisions into the statutes through judicial interpretation and neither should Illinois. Indeed, there is no legal or just basis for such a judicial re-writing of the Act. If the appellate court's opinion in *Munoz* stands, Illinois would become the most conservative state in the nation relating to judicial interpretation of injury rights.

II. The *Munoz* Court's Interpretation of the Illinois Workers' Compensation Act Results in an Arbitrary and Unreasonable Legislative Classification That Violate Illinois Constitution's Due Process, Equal Protection, and Special Legislation Clauses.

In *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill.2d 437 (1976), this Court specifically rejected the arguments of the defendants, who were not the employers of the plaintiffs, that they should be immune under section 5(a) of the Workers' Compensation Act ("WCA") for paying workers' compensation benefits to the plaintiffs—even where there is a pre-existing legal obligation to do so. There, this Court found only "employers" are entitled to the section 5(a) immunity, including where a non-employer general contractor

was required under the Act to pay workers' compensation benefits for its subcontractors' employees, and in fact did pay those workers' compensation benefits. Significantly, the *Laffoon* Court found that its holding was mandated by injured employees' constitutional rights to Due Process and Equal Protection of the laws. *Id*. at 443-47.

Notwithstanding the clear holding of *Laffoon*, as well as its *sole* reliance upon Due Process and Equal Protection, the *Munoz* appellate court erroneously discounted *Laffoon's* application to the present appeal and did not follow its constitutional mandates. In doing so, the appellate court simply distinguished *Laffoon* on the basis that Defendant general contractor Bully & Andrews had a contractual obligation to pay the workers' compensation benefits of its subcontractors' employees. *Munoz v. Bulley & Andrews, LLC*, 2021 IL App (1st) 200254, ¶¶22-23. But that is a distinction without a difference. While Defendant Bully had a contractual obligation to pay workers' compensation benefits, the defendant in *Laffoon* had a statutory obligation to pay workers' compensation benefits. That is to say, in both appeals, all the defendants indisputably had legal obligations to pay the workers' compensation benefits. There is no just reason why Due Process and Equal Protection do not apply to both sets of plaintiffs.

Laffoon involved defendant general contractors who were legally required to pay workers' compensation benefits to the plaintiff workers because the workers direct employing subcontractors were uninsured—as required by the Act's section 1(a)(3). 65 Ill.2d at 440. This Court held that the section 5(a) immunity did not apply to shield the general contractors from the plaintiffs' third-party claims, and this Court *solely* based its holding on injured workers' rights to Due Process and Equal Protection of the laws. *Id*. at 443-47. The *Laffoon* Court found that to hold otherwise—as was held in *Munoz*—will

result in unfair and differing applications of the Act to individual Illinois workers—an unjust, arbitrary, and impermissible classification among injured employees. *Id*. at 443-44.

As the *Laffoon* Court noted, with such an unfair and varied application, the resulting Due Process and Equal Protection violations are readily apparent in the example of two (2) tradesmen working on a construction beam which suddenly collapses injuring both of them. 65 Ill.2d at 443-44. The two (2) tradesmen will be treated completely different where a defendant general contractor has paid workers compensation benefits for one of the tradesmen, but not for the other. *Id*. In other words, where the defendant general contractor has paid for the first tradesman's workers' compensation benefits, that tradesmen will be barred from bringing a third-party complaint against the general contractor pursuant to 820 ILCS 305/5(b); but conversely, where the defendant general contractor has not paid for the second tradesman's workers' compensation benefits, that second tradesman will be permitted to bring a third-party complaint against the general contractor. The *Laffoon* Court found this disparate treatment to be clearly violative of injured workers' rights to Due Process and Equal Protection. *Id*. at 446-47. To ensure Due Process and Equal Protection, the Court held that the section 5(a) immunity confers "immunity upon employers only from common law or statutory actions for damages by their immediate employees." *Id*. at 447 (emphasis added).

This Court's *Laffoon* Opinion is consistent with the language and dictates of the Illinois Constitution. As commanded by that Constitution, "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Illinois Const., Art. I, § 2. In similar tandem, the General Assembly is

prohibited from passing special or local law when a general law is or can be made applicable. Illinois Const., Art. IV, § 13. Whether a general law is or can be made applicable is a matter for *judicial* determination. *Id.* (emphasis added). Special legislation and equal protection challenges are generally judged under the same applicable standard: Where the statute does not affect a fundamental right or involve a suspect or quasi-suspect classification, the appropriate standard of review is the rational basis test. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 393 (1997).

Under this standard, a court must determine whether the statutory classification is rationally related to a legitimate state interest. *Id.* at 394. The hallmark of an unconstitutional classification is its arbitrary application to similarly situated individuals without adequate justification or connection to the purpose of the statute. *Id.* at 396. Thus, this Court has consistently invalidated legislative statutes that created arbitrary classifications between groups of similarly situated injured plaintiffs or tortfeasors.[5]

Consider *Grasse v. Dealer's Transport Co.*, where this Court invalidated a provision of the Act that created arbitrary and unreasonable classifications. 412 Ill. 179, 192 (1952); *see generally Best*, 179 Ill.2d at 399-400 (discussing *Grasse*). At issue in

[5] *See, e.g.*, *In re Belmont Fire Protection District*, 111 Ill.2d 373, 281-86 (1986) (invalidating a statute which authorized only counties with populations of between 600,000 and 1 million residents to consolidate all fire protection services into one district); *Wright v. Central Du Page Hospital Ass'n*, 63 Ill.2d 313, 325-30 (1976) (invalidating $500,000 limit on compensatory damages in medical malpractice actions); *Grave v. Howlett*, 51 Ill.2d 478, 486-87 (1972) (invalidating a limit on recovery applicable to damages inflicted by commercial motorists, but not private motorists); *Skinner v. Anderson*, 38 Ill.2d 455, 459-60 (1967) (invalidating a statute of repose for construction-related injuries for architects and contractors, but no other potential defendants in the construction process); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 193-99 (1972) (invalidating discriminatory classifications of employers, employees, and third-party tortfeasors in workers' compensation provision).

Grasse was a provision that, in certain cases, operated by automatically transferring an employee's common law right of action against a third-party tortfeasor to his employer. *Id.* The provision divided injured employees into two arbitrary classes based solely on the fortuity of whether or not the third-party tortfeasor was also bound by the provision. *Id.* The result was that one class of injured employees were deprived of their right to collect compensatory damages from the third-party tortfeasor, while the other class of similarly situated injured employees retained their right. *Id.* This Court held that the provision created unreasonable classifications in which the plaintiff's ability to recover complete compensation was determined by fortuitous circumstances. *Id.*

In addition to the unequal treatment of injured employees, this Court determined that the provision divided third-party tortfeasors into two classes: those bound by the workers' compensation provision, who were freed from paying compensatory damages to employees of other entities under the act, and all other tortfeasors, who remained liable for the full amount of fairly assessed compensatory damages. *Id.* In other words, the first class of tortfeasors were only required to pay amounts sought by the employer as reimbursement for worker's compensation payments, while the second class of tortfeasors remained liable to the plaintiff for the full amount of compensatory damages assessed by a trier of fact. *Id.* As such, this Court held that the distinctions were arbitrary and constituted a violation of the special legislation clause of the Constitution of the State of Illinois. *Id.*

If the *Munoz* decision is allowed to stand, the very Due Process and Equal Protection violations this Court described in *Laffoon* and *Grasse* will result. Where non-employer construction defendants (such as general contractors) contract to provide

workers' compensation benefits to non-employees, the injured non-employees' suits against the non-employer defendants for negligence will be barred by the section 5(a) immunity; and conversely, where non-employer construction defendants do not contract to provide workers' compensation benefits to non-employees, the injured non-employees will be permitted to bring such third-party suits against the defendants. The disparate treatment here, based solely on whether the general contractor decides to insert an insurance provision in the construction contract, constitute Due Process and Equal Protection violations. This was not the law of Illinois as articulated in *Laffoon*. And this cannot be the law now.

III. The *Munoz* Opinion Impermissibly Allows General Contractors to Exculpate Themselves for Their Own Negligence in Violation of Illinois Public Policy.

Allowing *Munoz* to stand would clearly undermine the Illinois policy as expressed in the Construction Contracts for Indemnification Act that general contractors cannot indemnify or exculpate themselves from their own negligence on construction sites. *See* 740 ILCS 35/1 (West 2004) (the "Anti-Indemnification Act"). Indeed, the Act operates to void agreements that attempt to indemnify or exculpate (hold harmless) persons from their own negligence. This Court has recognized the policy behind the Act as ensuring a continuing motivation to take accident prevention measures and provide safe working conditions. *Davis v. Commonwealth Edison Co.*, 61 Ill.2d 494, 497, 498-99 (1975) (affirming trial court's refusal to enforce contract provision that violated Anti-Indemnification Act). Consistent with this policy recognized in *Davis,* the First District has noted that the legislature declared it is against public policy for a party to a construction contract to be "exculpated from liability" for its own negligence. *First Financial Ins. Co. v. Purolator Sec., Inc.*, 69 Ill.App.3d 413, 418 (1st Dist. 1979). The

First District Appellate Court explained this policy in *Playskool, Inc. v. Elsa Benson, Inc.*, 147 Ill.App.3d 292 (1st Dist. 1986):

> This policy has been codified in 'an Act in relation to indemnity in certain contracts' which provides that agreements to indemnify or hold harmless another person from that person's own negligence are void as against public policy and wholly unenforceable. This statute was enacted in 1971 as a codification of long-standing common law policy in Illinois discouraging clauses that attempt to insulate one from his own negligence.

147 Ill.App.3d at 300-01. Accordingly, a construction contract "which purports to relieve a tortfeasor of some or all of its liability, premised upon its own negligence, cannot stand in light of the Indemnity Act." *Motor Vehicle Cas. Co. v. GSF Energy, Inc.*, 193 Ill.App.3d 1, 7 (1st Dist. 1989).

Here, the result of the *Munoz* Court's holding is that a general contractor can exculpate or immunize itself against its own negligence in the construction trades if it simply makes a cost-free financial alteration in the subcontracts. General contractors can seek lower, cost-saving bids from subcontractors, telling the subcontractors that they do not have to buy workers' compensation insurance. The general contractor can then take that saved money and purchase the workers' compensation insurance. And now under *Munoz*, this bidding maneuver would not only save the general contractors monies in the bidding process, but would eliminate all third-party liability for their own negligence. Through this simple financial slight of hand, general contractors would essentially end all third-party construction negligence claims in Illinois, making it the only State we can find that would allow such a technique to subvert liability for its own negligence, where the legislature has not specifically written such an expansion into the statute. This will effectively excuse the negligence of all general contractors under Sections 414 and 343 of the Restatement (Second) of Torts.

Also relative to Illinois public policy, this Court has emphasized the need for ensuring safe working conditions for Illinois workers. *See Davis*, 61 Ill.2d at 497, 498-99 (work in the construction industry is often hazardous and if it is not performed with proper safeguards and precautions, workers and members of the general public as well are exposed to the danger of injury). Certainly Illinois workers need to be protected in the workplace from recognized hazards.

The holding and consequence of *Munoz* patently contravenes Illinois public policy and should not be permitted by this Court.

IV. The *Munoz* Holding Creates an Absurd Result.

The result of the *Munoz* holding is that the general contractor escapes any and all third-party liability, yet still retains a statutory right to recover from the subcontractor any workers' compensation benefits the general contractor paid for the worker. *See* 820 ILCS 305/1(a)(3) ("In the event any such person pays compensation under this subsection he may recover the amount thereof from the contractor or sub-contractor, if any, and in the event the contractor pays compensation under this subsection he may recover the amount thereof from the sub-contractor, if any"). Thus, by the *Munoz* Court's reasoning, the general contractor effectively gets to have its cake and eat it too. Such a result is absurd and turns the Act on its head.

V. To Accept the *Munoz* Holding Would Constitute the End to Construction Injury Litigation and Workers' Protections.

If the Court allows the appellate court's *Munoz* opinion to stand, this would ensure the end of construction litigation and the end of worker protections in one of the most dangerous occupations in society—heavy construction. *See* 820 ILCS 305/3 (declaring construction work as "extra hazardous").

Defendant Bulley & Andrews, in its role of general contractor, owed a duty to use reasonable care in its exercise of retained control over safety on the construction site. *See* Restatement (Second) of Torts § 414 (finding liability for retaining control of the work); *see also Grillo v. Yeager Constr.*, 387 Ill.App.3d 577, 594 (1st Dist. 2008). This duty of care is owed by general contractors throughout Illinois. But by choosing to insert a contractual provision in the contract with the owner that required Bulley to pay the subcontractor's workers compensation insurance, and ultimately Munoz workers' compensation benefits, Defendant Bulley "games" the system to avoid liability in common law for its own negligence.

This Court warned of this very gamesmanship in *Laffoon*: "Significantly, the real possibility must not be overlooked that in certain situations this may not be such a 'fortuitous circumstance' for the general contractor. He may attempt to cloak himself with immunity and thereby abate liability for his negligent or otherwise wilful conduct by hiring only those subcontractors who have no compensation coverage"—thereby ensuring that the general contractor will have to pay for workers' compensation benefits in the case of injuries due to the defendant's own negligence. *Laffoon*, 65 Ill.2d at 446. Hence, this warning by this Court in *Laffoon* expressed the very reason why the *Munoz* decision should be reversed.

Indeed, the *Munoz* decision rewards this very gamesmanship. To avoid its duty of care to Illinois workers and liability for its own negligence, construction defendants such as general contractors can simply contract to provide workers compensation coverage moving forward. And construction contracts that require the general contractor to

exercise reasonable care to make the project safe for workers would become meaningless, futile, and completely ineffective.

If the *Munoz* opinion stands, Illinois will become one of the worst States in the nation for protecting construction workers from injury.

CONCLUSION

As a matter of precedent, reason, and experience alike, this Court should reverse the decision of the Appellate Court and reverse the judgment of the Circuit Court.

Respectfully Submitted,

/s/ *Thomas Kelliher*

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and table of authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to appended to the brief under Rule 324(a), is 19 pages.

/s/ *Thomas Kelliher*